JURISDICTION AND STATUTE INVOLVED

Respondent agrees that Petitioner has invoked this Court's jurisdiction under Title 28, United States Code, Section 1254 (1) and that the federal statute involved is Section 36(c) of the National Bank Act, as amended (12 U.S.C., Sec. 36(c) (1965 Supp.)). Respondent does not agree, for the reasons hereinbelow set forth, that Title 28, United States Code, Section 1331 or Rule 12(h) of the Federal Rules of Civil Procedure are involved, or with the questions presented as stated by Petitioner.

THE QUESTION PRESENTED

The sole question presented is:

Whether the Comptroller of the Currency exceeded his authority under Section 36 (c) (1) of the National Bank Act, as amended (12 U.S.C., Sec. 36 (c) (1)), in issuing to Petitioner a certificate approving and authorizing it to establish and operate a new branch bank in the City of Logan, Utah, if such establishment and operation of a branch by a state bank of the State of Utah in an identical situation with that presented here is not authorized by the law of the State of Utah.

STATEMENT OF THE CASE

Respondent, Walker Bank & Trust Company, is a banking corporation organized under the laws of the State of Utah, with its Main Office located in Salt Lake City, Utah. Respondent operates a branch bank in the City of Logan, Utah, which it acquired on December 18, 1956 as the result of a statutory merger whereby a state bank located and operating in Logan, Utah, was merged with and into Respondent. Logan is a city of the second class as cities are classified by the statutes of the State of Utah.

Petitioner, a national banking association, operates a bank which is located in Logan. Petitioner, with the approval of the Comptroller of the Currency, established a new branch bank in Logan in addition to its main bank located in said city. Respondent brought this action in the United States District Court for the District of Utah against Petitioner and the Comptroller of the Currency to obtain a declaratory judgment that the issuance by the Comptroller of the Currency of his certificate approving and authorizing the establishment and operation of said branch bank violated Section 36(c) of the National Bank Act, and for injunctive relief against the continued operation of said branch bank.

The District Court, by memorandum opinion, held that the Comptroller of the Currency acted within his authority in authorizing the establishment and operation of the branch bank in question and dismissed the complaint and action. On appeal to the United States Court of Appeals for the Tenth Circuit, the court held that the Comptroller exceeded his authority in the issuance of the certificate authorizing Petitioner to establish and operate said branch bank, reversing the judgment of the trial court and remanding the case with directions to reopen the same for the taking of any additional evidence, if offered, on the remaining issues and to make appropriate findings of fact and conclusions of law not inconsistent therewith.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY DETERMINED THE QUESTION PRESENTED.

Section 36 (c) (1) of the National Bank Act in clear and unambiguous language conditions the establishment and

operation of a branch by a national bank within the limits of a city, town or village in which said bank is situated upon such establishment and operation being expressly authorized to state banks by the law of the State in question. It is perfectly clear, as pointed out by the trial court[1] and the Court of Appeals,[2] that the establishment and operation of petitioner's new branch would not be authorized to state banks by the law of the State of Utah.

The Supreme Court of Utah in *Walker Bank & Trust Company v. Taylor,* 15 U.2d 234, 390 P.2d 592 (1964), in construing Utah Code Ann., Title 7, Chap. 3, Sec. 6 (1953, as amended), held that the establishment and operation of a new branch in a city of the second class in which is located a unit bank is not authorized—and on the contrary is prohibited—by said section of the Utah Code, although, as in the instant case, a bank seeking to establish such branch is the only unit bank located in such city. In reaching its decision the Utah Supreme Court pointed out that the only method provided by the Utah statute for acquiring a branch bank in a city of less than the first class having an existing bank is that the bank seeking to establish such branch shall take over an existing bank.[3] It is stipulated that Petitioner did not acquire its branch by taking over an existing bank.

---

1. 234 F. Supp. at 76-77.
2. 352 F.2d at 92.
3. The pertinent provisions of Sec. 7-3-6, Utah Code Annotated 1953, are as follows:

   "Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years."

The Court of Appeals reviewed at length the legislative history of Section 36 (c) of the National Bank Act and concluded therefrom — as manifest from the language of the Act itself—that Congress intended that a national bank should have no greater rights to establish a new branch than it would under state law if it were a state bank.[4] In *Commercial Security Bank v. Saxon,* 236 F. Supp. 457 (D. D.C., 1964), the court decided a case directly on point involving an action by a state bank of the State of Utah in which it sought a declaratory judgment that the approval by the Comptroller of the Currency of a branch application filed by a national bank to establish a branch in the City of Ogden, a city of the second class, would violate Section 36(c) (1) of the National Bank Act. The court held that the issuance of such certificate by the Comptroller "would constitute a violation of 12 U.S.C.A., Sec. 36" and restrained the Comptroller from issuing his certificate. The judgment of the trial court was affirmed *per curiam* on appeal to the Court of Appeals for the District of Columbia, citing the instant case. (Civil 1815-63, D.C. Cir., filed November 18, 1965.)

It is clear that if Petitioner were a state bank, the law of Utah would prohibit the establishment and operation of its branch bank. The Comptroller of the Currency issued his certificate approving and authorizing the establishment and operation of Petitioner's branch, even though such establishment and operation in an identical situation is not authorized to state banks by the laws of the State of Utah. In so doing the Comptroller exceeded his authority under Section 36 (c) (1) of the National Bank Act as demonstrated by the language of the Act and the legislative his-

---

4. For cases supporting the Tenth Circuit decision, see cases cited by it in Footnote 10, 352 F.2d at 94; and see also *Hoosier State Bank of Indiana v. Saxon,* Civil No. 4111, ... F. Supp. ....., (D.C. Ind. 1965).

tory thereof reviewed by the Court of Appeals. A contrary determination on the question presented would require judicial legislation.

II.

THERE IS NO CONFLICT IN THE DECISIONS OF THE COURTS OF APPEALS

Contrary to Petitioner's contention, the decision rendered by the Court of Appeals for the Tenth Circuit is not in conflict with the decision rendered by the Court of Appeals for the Fourth Circuit in *First National Bank of Smithfield, North Carolina v. Saxon,* 352 F.2d 267 (4th Cir. 1965). The issues in that case revolved around the question whether the administrative discretion exercised by the Comptroller of the Currency in approving a national bank branch is subject to judicial review invoked by a competing bank under the Administrative Procedures Act.[5] That question was not presented for review nor involved in the cases decided by the Courts of Appeals for the Tenth and District of Columbia Circuits.

The Court of Appeals for the Fourth Circuit vacated the trial court's order annulling and enjoining the Comptroller's issuance of a certificate of approval to a national bank on the ground that the trial court erred in holding that if such certificate is issued by the Comptroller without an adversary hearing conforming to the requirements of the Administrative Procedures Act it is ex facie invalid. In so doing, however, and in remanding the case to the District Court, the Court of Appeals upheld the jurisdiction of the District Court to review de novo the action of the Comptroller. In making such review, the court rejected the contention that the Comptroller's approval is contingent upon his compliance with the inquiries and ascertainments

5. 60 Stat. 237 (1946), as amended, 5 U.S.C., Sec. 1001, et seq. (1964 Edition).

required of the State Commissioner of Banks of North Carolina with respect to the approval of state bank branches and pointed out that Congress intended that the Comptroller in exercising his discretion in approving a branch under Section 36 (c) of the National Bank Act intended to allow the Comptroller to consider as a factor in his decision to grant or refuse approval, the public interest, need and necessity, subject, however, to court review in respect thereto. It is important to note that the Circuit Court of Appeals in that case pointed out that the trial court should first consider "the criteria enumerated in the Banking Act, 12 U.S.C., Sec. 36(c), supra, viz: *Whether the establishment of the branch is 'authorized to State Banks' and the location conforms to the restriction of State laws.*" *Id* 352 F.2d 267 at 272 (emphasis added).

III.

THE QUESTION RAISED BY PETITIONER WITH RESPECT TO THE TRIAL COURT'S JURISDICTION IS NOT SUBJECT TO REVIEW AT THIS STAGE OF THE PROCEEDINGS.

Petitioner seeks a review on the merits of the question whether the trial court lacked jurisdiction over the subject matter, citing *KVOS v. Associated Press,* 299 U.S. 269 (1936) and *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178 (1936). That question is not involved nor subject to review in the present posture of this case.[6]

At the trial of this case in the District Court, Petitioner challenged the court's jurisdiction by a Motion to Dismiss. The trial court found and determined that it had jurisdiction over the subject matter and denied Petitioner's motion. The only record on appeal with respect to the proceedings

6. *Slaker v. O'Connor,* 278 U.S. 189 (1929).

had in the trial court on Petitioner's motion is a minute entry: "Motion of counsel for the First National Bank of Logan to dismiss was denied."

It is clear that the Court of Appeals did not review nor decide any question except that hereinabove stated.[7] The case was: ". . . remanded with directions to reopen the same for the taking of any additional evidence, if offered, on the remaining issues and to make appropriate findings of fact and conclusions of law not inconsistent herewith."[8] This Court should not review on the merits an issue not as yet finally determined.

CONCLUSION

Respondent respectfully submits, for the reasons stated, that the petition for certiorari should be denied.

Respectfully submitted,

JOSEPH S. JONES
C. E. HENDERSON
800 Walker Bank Building
Salt Lake City, Utah

Attorneys for Respondent

Of Counsel:

RAY, RAWLINS, JONES & HENDERSON

---

7. The opinion of the Circuit Court of Appeals states: "Our sole question pertains to the authority of the Comptroller to issue such certificate." 352 F.2d at 91.

8. *Id.* at 95.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 875

THE FIRST NATIONAL BANK OF LOGAN, LOGAN, UTAH, A NATIONAL BANKING ASSOCIATION, PETITIONER

v.

WALKER BANK & TRUST COMPANY, A CORPORATION

AND

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM ON BEHALF OF THE COMPTROLLER OF THE CURRENCY

Under Utah law (Utah Code Ann. (1953), § 7–3–6), a bank chartered by the State may (except in cities of the first class) establish a new branch only by taking over an existing bank. Logan, Utah, is not a city of the first class, and is hence subject to this limitation. The First National Bank of Logan sought the approval of the Comptroller of the Currency for permission to open a branch in Logan, not by taking over an existing bank, but by opening a new office. Approval was granted. Walker Bank & Trust Co., a bank chartered by the State of Utah and having a

210-764—66

branch in Logan, then brought this action against the Comptroller contending that his action in approving First National's branch application was barred by 12 U.S.C. 36(c), which provides that a national bank may, with the Comptroller's approval, establish and operate branch banks "[w]ithin the limits of the city, town or village in which * * * [the bank] is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question." The Court of Appeals for the Tenth Circuit upheld the State bank's position, holding that Utah's "take over" limitation is binding upon the national banks located in the State by virtue of 12 U.S.C. 36(c). 352 F. 2d 90. First National, a defendant below, filed a petition for a writ of certiorari to review the Tenth Circuit's judgment.

The identical issue presented here—whether Utah's "take over" limitation applies to national banks by virtue of 12 U.S.C. 36(c)—is also raised in *First Security Bank of Utah* v. *Commercial Security Bank*, No. 1009, October Term, 1965, pending on petition for certiorari to the District of Columbia Circuit. Indeed, in holding for the State bank in *Commercial Security*, the District of Columbia Circuit rendered no opinion, but merely cited the Tenth Circuit's decision in the instant case. The Solicitor General, simultaneously herewith, has filed a petition for certiorari on behalf of the Comptroller in the District of Columbia case.[1]

[1] We see no distinction between the instant case and *Commercial Security*. We have refrained from filing a petition in this case merely to avoid unnecessary duplication.

In view of the identity of issues in the two cases, and for the reasons set forth in our petition in *Saxon* v. *Commercial Security Bank,* we urge the Court to grant the petition for certiorari in the instant case.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MARCH 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966